No. 78-495

In the Supreme Court of the United States

OCTOBER TERM, 1978

COLE HOSPITAL, INC., PETITIONER

v.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

JEFFERSON MEMORIAL HOSPITAL ASSOCIATION, PETITIONER

v.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A11) is not reported. The orders of the district court (Pet. App. A12-A18) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A4-A5) was entered on July 13, 1978. A petition for rehearing

was denied on August 11, 1978 (Pet. App. A2-A3). The petition for a writ of certiorari was filed on September 22, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether district courts have jurisdiction to enjoin the Secretary of Health, Education, and Welfare from terminating a hospital's Medicare provider agreement in a suit brought prior to the hospital's commencement of the administrative remedies afforded by Title XVIII of the Social Security Act.

STATEMENT

Title XVIII of the Social Security Act, 42 U.S.C. 1395 *et seq.* (the "Medicare Act"), provides an insurance program for "costs of hospital and related posthospital services" for senior and disabled persons who qualify for such benefits. 42 U.S.C. 1395c. Payment for such services is made by HEW directly to the hospitals that provide them to beneficiaries. 42 U.S.C. 1395g. A hospital is eligible for participation in the Medicare program only after it signs an agreement demonstrating its intention to comply with all program requirements relating to the quality and costs of covered services as established by the statute or the Secretary's implementing regulations. 42 U.S.C. 1395cc. HEW may terminate that agreement if the hospital fails to abide by its terms or is not in conformity with state and local laws relating to health, fire and safety standards. 42 U.S.C. 1395cc(b), 1395x(e)(9); 20 C.F.R. 405.1020, 405.1022(b).

Cole Hospital has been a Medicare provider since 1966 (Pet. App. A7). As early as August 1972, the hospital was notified by the Illinois Public Health Department, which

acts as a survey agent for HEW, that to maintain its license it must correct certain fire safety deficiencies (C.A. Add. 1a).[1] The hospital admitted that it was "acutely aware of the fire safety deficiencies in the present hospital structure" but asserted that it planned to build a new facility by 1974 (C.A. Add. 2a). On April 10, 1975, HEW warned Cole that if it did not correct a substantial number of fire safety deficiencies reported by the state agency, its agreement could be terminated (C.A. Add. 3a-8a). On October 3, 1975, HEW notified the hospital that its agreement would be terminated on November 1, 1975, and that it had the right to request an evidentiary hearing within six months pursuant to 42 U.S.C. 1395ff(c) and 405(g). Without requesting such a hearing, the hospital filed a complaint in the district court, asking the court to enjoin HEW from terminating its Medicare provider agreement (C.A. Add. 14a-20a). The district court entered a preliminary injunction enjoining termination of the agreement pending further order of the court (Pet. App. A12-A14).[2] The injunction was subsequently indefinitely extended (Pet. App. A15-A16).

Jefferson Hospital also has been a Medicare provider since 1966. In January 1975 the Illinois Department of Public Health notified HEW that the hospital was not in compliance with fire and safety standards, which providers of services must satisfy to participate in the Medicare program (C.A. Add. 31a).[3] On January 16,

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[1]"C.A. Add." refers to the Addendum to the Brief for the Secretary of Health, Education, and Welfare filed in the court of appeals.

[2]The court stated (Pet. App. A13) that termination "will cause * * * [petitioner] irreparable harm," that an injunction will cause HEW "little, if any, harm," and that petitioner "has created with the Court an impression that it is likely to succeed in a trial on the merits."

[3]Compliance with designated fire and safety codes is required by 42 U.S.C. 1395x(e)(9) and implementing regulations (20 C.F.R. 405.1020 *et seq.*).

1976, HEW notified the hospital that its provider agreement would be terminated on February 6, 1976, because it did not meet fire safety requirements, and that it was entitled to request an evidentiary hearing within six months (C.A. Add. 26a-29a). Without requesting such a hearing, on January 19, 1976, the hospital filed a complaint for injunctive relief in the district court (C.A. Add. 30a-35a). The court enjoined HEW from terminating the hospital's provider agreement pending further judicial proceedings (C.A. Add. 36a-37a).

The Secretary appealed from the injunctions, and the cases were consolidated in the court of appeals. Argument was heard on April 29, 1976, but the court of appeals withheld its decision until July 12, 1978. In the intervening period petitioners received administrative hearings, which they had requested after the district court's preliminary injunctions had been entered (Pet. App. A11). The administrative law judge held that Cole Hospital had been in serious and "deplorable" violation of applicable fire safety standards, so that immediate termination of its provider agreement was justified (Pet. App. A11). Cole has appealed to the HEW Appeals Council, a hearing has been held (Pet. 4; Pet. App. A11), and a final agency decision will be rendered shortly. The administrative law judge decided and recommended that Jefferson Hospital's provider agreement be extended (Pet. App. A11). The Secretary has appealed to the Appeals Council, and a hearing will be scheduled shortly.

The court of appeals concluded that although the complaints argued that the Medicare Act violates the Due Process Clause by denying them pre-termination hearings, petitioners had not sought the convening of a three-judge court, and thus the cases in their present posture present "an attempt to review the administrative

decisions" (Pet. App. A8-A9).[4] Reasoning that for jurisdictional purposes HEW's determination to terminate a provider agreement is equivalent to a determination to terminate recipients' benefits, the court held that the district court lacked jurisdiction (Pet. App. A9-A11). Petitioners relied on 28 U.S.C. 1331 (federal question jurisdiction) and the Administrative Procedure Act. *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), made the former unavailable, and *Califano* v. *Sanders*, 430 U.S. 99 (1977), held that the latter is not a grant of jurisdiction at all. The only other source of jurisdiction was 42 U.S.C. 1395ff(c) (which incorporates the provisions of 42 U.S.C. 405(g) for judicial review of a "final decision of the Secretary made after a hearing"). The court held that this statute, too, did not provide jurisdiction, because no "adequate claim for continuation of provider status" was presented to the Secretary by the petitioners (Pet. App. A10-A11). The court accordingly vacated the district court's injunctions and remanded with directions to dismiss the actions unless the petitioners amended their complaints to show jurisdiction "consistent with [its] order" (Pet. App. A11).

ARGUMENT

The court of appeals in this case considered three possible sources of federal jurisdiction. It held that the first, 28 U.S.C. 1331, is not available to petitioners for the reasons stated in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975),[5] and that the second, the Administrative

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[4]The court observed that the hospitals had not pressed the request in *Cole* for a three-judge court, and had not included a request for a three-judge court in the complaint in *Jefferson* (Pet. App. A8-A9). (The complaints were filed before the repeal in 1976 of the statute requiring three-judge courts in cases seeking injunctions against the operation of federal statutes. The prior law thus controls. Pub. L. No. 94-381, 90 Stat. 1119).

[5]42 U.S.C. 1395ii incorporates into the Medicare Act 42 U.S.C.405(h), which bars general federal question jurisdiction.

Procedure Act, is not a source of jurisdiction at all for the reasons stated in *Califano* v. *Sanders*, 430 U.S. 99 (1977). The court considered the possibility that a third source of jurisdiction—42 U.S.C. 405(g), as incorporated by 42 U.S.C. 1395ff(c)—might be available, but it held that petitioners could not assert jurisdiction under that statute because, at the time they filed their complaints, they had not filed a claim with the Secretary of HEW and thus had not actuated the administrative procedures. It remanded the case to the district court so that petitioners could amend their complaints to state a ground of jurisdiction.

There is no need for this Court to review this interlocutory order. The question whether any of the three grounds of jurisdiction discussed by the court of appeals was available when the complaints were filed has become academic. Petitioners eventually filed administrative claims, and these have proceeded almost to completion (see page 4, *supra*). It may well be that an amended complaint now would give the district court jurisdiction under 42 U.S.C. 405(g) as interpreted by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 326-332 (1976). Here, as in *Eldridge*, parties who have filed requests for hearings claim to be aggrieved by the delay in obtaining a final decision. *Eldridge* indicates that the need to complete the administrative process may not always be enforced in such circumstances, and the Seventh Circuit has so held. *Wright* v. *Califano*, No. 78-1174 (Nov. 16, 1978), slip op. 5-8. There is thus every reason to believe that, if petitioners simply amend their complaints, as the court of appeals has invited them to do, to allege that they have filed claims with the Secretary, then the district court will accept jurisdiction. And even if the court does not do so, the administrative processes should be completed within a short time—indeed, within less time than it would take for this Court to review the case—and there then unquestionably will be jurisdiction under 42 U.S.C. 405(g). Review by this Court would involve the adjudication of

issues that are irrelevant to further proceedings in this case.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Petitioners address a number of issues that are not properly presented.

Petitioners argue (Pet. 16-17) that the district court had jurisdiction under 28 U.S.C. 1361. They did not allege this ground of jurisdiction in the complaint, however, and the court of appeals did not discuss it. If petitioners believe that jurisdiction exists under this statute, they are free to raise their arguments on remand in the district court. (We have argued that Section 1361 does not create jurisdiction in cases such as the present one. See the Brief for Petitioner in *Califano* v. *Elliott*, cert. granted, No. 77-1511 (Oct. 2, 1978). We have furnished counsel for petitioners with a copy of this brief. Because the court of appeals did not discuss Section 1361 here, however, there is no reason to defer consideration of this petition pending the resolution of *Elliott*.)

Petitioners maintain (Pet. 17-22) that either the Constitution or the Social Security Act requires an oral hearing prior to the termination of a Medicare provider's agreement. We do not agree with this argument, for the reasons addressed in our brief in *Elliott*. But because the court of appeals vacated the district court's injunctions on jurisdictional grounds, it had no occasion to decide the constitutional and statutory issues, and they are not presented for resolution by this Court.

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